No. 3034

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN, GEORGE STANLEY and SAM SALLO,

Appellants,

vs.

H. GREENBERG,

Appellee.

BRIEF FOR APPELLANTS.

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PERNAU-WALSH PRINTING CO.

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Statement of the Case.

The plaintiff, appellee herein, brought this action for the dissolution of a mining copartnership and for an accounting. An opinion, findings of fact, conclusions of law, and a decree were filed and entered. Defendants appealed. This court modified and affirmed the decree of the lower court (Lesamis et al. v. Greenberg, 225 Fed. 449). This is the second appeal.

By the opinion and mandate of the appellate court the basis for the account established by the trial court was found to be erroneous. The appel-

late court undertook to recast the account on a new basis, theory and construction established by it, but in so doing inadvertently overlooked certain errors in computation made by the trial court and incorporated them in their findings. The appellate court also inadvertently overlooked and neglected to make certain charges against plaintiff necessarily to be made under and by reason of said new basis for the account.

It will be remembered that the defendants Lesamis, Tyapay and Garbin, were the owners of certain mining claims; that plaintiff Greenberg bought a quarter interest in the same for $30,000; he paid $6000 down; the balance, $24,000, as specified in the deed, was "to be paid of the first money taken out of the ground". The trial court had decided that the fourth interest purchased by Greenberg was to be paid for by applying to this purpose the entire net proceeds of the mining claims. The appellate court decided that payment for the Greenberg interest was to be made by applying thereto the gross gold output of the Greenberg fourth interest. The said parties formed a mining copartnership, known as the Klery Creek Mining Company. In 1910 the gross output of their mining was $16,351.42, and the expenses, $8959.75, leaving a net profit of $7391.67. Plaintiff took the net profits, and, adopting the erroneous basis for accounting, also adopted by the trial court, he paid from said net profit to Lesamis $1726.00, to Garbin $1512.12, and to Tyapay $2000.00, in reduction of purchase

money due, in all, $5238.12 (Tr. 106); the balance of said net profit he turned over to Robinson-Magids Company, of which firm he was a member, as an advance towards expenses of the following year. By reason of said payments and advances, said firm extended credits to defendants as follows: To Lesamis $737.89 (Tr. 106), Tyapay $463.89 (Tr. 106), and Garbin $951.70 (Tr. 106).

It would thus appear that all the expenses for the year 1910, including Greenberg's share thereof, had been paid from the gross output during that year, which gross output under the construction and basis for accounting established by the appellate court all belonged to the defendants, who, in fact, therefore, paid all the expenses. Plaintiff contributed nothing towards expenses in 1910, and withdrew from the partnership, of net profits, said $5238.19 and used same to reduce his individual debts to his partners. This he could properly do on the theory of the trial court, but could not do on the theory of the appellate court.

In 1911 the total output as found by the court was $9786.88 which amount, however, embraced not only the gold output for that year, but also the credits extended to defendants in 1910 above mentioned, and also the sum of $1158.53 borrowed from Frank Lesamis, and admitted by plaintiff (Tr. folio 128 of record on former appeal). The total expenses of the partnership for 1911 was $26,271.70 (Tr. 106), all found to be due to Robinson-Magids & Company, who received and applied on their said

account the said so-called output of $9786.88, leaving a balance due them as found by the trial court of $16,484.82 and interest (Tr. 106). Thus it appears that in 1911 the defendants paid towards expenses for that year their credits above mentioned, and all of the gross output of 1911, to which they alone were entitled, and that, again, plaintiff failed to contribute one cent towards expenses. The plaintiff, therefore, owed the partnership his one-quarter of all expenses and the moneys withdrawn from the net of 1910, and, of course, owed defendants a sum equal to his one-quarter of the gross. The trial court undertook to deduct the credits above mentioned from the liabilities of defendant (Tr. 64, 65), and by errors in subtraction aggregating $1015.11 found to be due from

Lesamis,	$4,429.21	instead of	$4,090.84
Tyapay	4,703.21	instead of	4,364.84
Garbin	4,215.40	instead of	3,877.03
Greenberg	5,967.10	instead of	6,982.21
	$19,314.92		$19,314.92

said totals being the indebtedness of the partnership found to be due to Robinson-Magids Company, including interest.

The appellate court built its computation upon said erroneous balances, a fact not discovered by defendants until after mandate. But, further:

The appellate court, in adjusting and recasting the account under the new basis for the account established by it, "as the business of the firm resulted in a deficit", proceeded to ascertain the

amount due from each of the partners to the firm, and, in such "adjustment", building on the erroneous figures of the trial court first found the amount of the one-quarter gross output for both years, to which defendants were entitled on account of purchase money due from plaintiff, but deducted therefrom one-quarter of the net profits of 1910 (why?), leaving a balance of $4661.66 (225 Fed. 452). Instead of ordering this to be paid to the defendants, the court increased the plaintiff's liability to the partnership by said amount without deducting from the figures of the trial court the amount erroneously credited to him by reason of the same fund, and reduced the liability of each of the defendants by one-third of said amount, $1553.88, and thus, without any consent of the parties, or discharge by the creditor effected a quasi equitable novation, without any mandatory order in regard to payments. The appellate court in its statement of account, overlooked the moneys withdrawn by plaintiff from the firm, which were applied on his individual indebtedness to his partners, and further overlooked the fact that plaintiff, not sharing in the gross for any such purpose, had not contributed one cent towards the expenses of the partnership. Plaintiff's liability to his partners was one-quarter of the gross output and his liability to the firm was one-quarter of the expenses and the moneys withdrawn by him from net profits. The trial court had already credited plaintiff with his share of the gross in reduction of partnership debts. Should not this be charged

back to the plaintiff and allowed to defendants? If so, this could not be done by building on the figures of the trial court. On the coming in of the mandate the defendants by petition sought to have above errors, all of them apparent on the face of the record, corrected; but the trial court, believing that it was bound by a literal construction of the mandate, refused to make the correction, and made new findings and entered an amended decree, as it believed, in conformity with the mandate.

The defendants, conceiving that the corrections should be made on motion after such entry, and conceiving that aside from the errors above mentioned, other matters, including further accounting, were left open by the mandate, filed a motion upon affidavit for such corrections and further accounting, which motion was denied, and exceptions allowed (Tr. 117, 129).

It appearing also that plaintiff, who was the bidder at the execution sale of the partnership property was still in default in the payment of the amount bid on said sale, $3000.00 (Tr. 122), the defendant further moved that the sale be set aside, which motion was also denied, and exception allowed. Some provision for payment and distribution of this money should be povided for.

The present appeals are from the amended decree after mandate; from the order of the District Court denying defendants' petition for entry of judgment and correction of errors of computation, etc.; from the order of the court denying defendants' motion

to correct and amend the amended findings and amended decree, and to correct patent errors in computation and for further accounting; and from the order refusing to vacate the sale on execution.

The questions involved, therefore, are,

1. Do the present appeals lie to correct manifest errors in the decree, after mandate, it appearing that such consist in the particulars assigned as error, to wit: (a) Misconstruction of the mandate and opinion as to the facts and as to the law of the case; (b) failure to follow the opinion and mandate; (c) errors in matter of computation apparent on the face of the record, and not denied, and undiscovered until after the filing of the mandate; (d) inconsistencies in and incompleteness of the decree; (e) failure to grant material and appropriate relief within the material issues of the pleadings and outside of the mandate and not adjudicated by the original decree, or by the opinion and mandate of the appellate court.

2. Does the amended decree show reversible error? (See specifications.)

3. Did the trial court err in refusing to appoint a referee and to order a further accounting? Appellants claim that the decree contemplated this.

4. Did the trial court err in refusing to vacate the sale on execution?

Specification of Errors.

The decree appealed from is erroneous in this:

1. It does not show entry pursuant to the mandate.

2. It does not appear to be entered upon the amended findings.

3. It does not comply with the mandate and is inconsistent with the findings, the opinion of the appellate court and with said mandate.

4. It follows findings erroneous in matter of computation, apparent on the face of the findings, which errors in computation to wit, in the subtraction of the certain credits, mentioned in the findings from the one-quarter of the indebtedness from the partnership found due to Robinson-Magids Company, $4828.73 and in which subtractions the mistakes aggregated the sum of $1015.11, and which errors in subtraction were inadvertently carried into the original decree and into the opinion and mandate of the appellate court and into the amended findings and amended decree, and which errors are not denied.

5. The amended findings and amended decree assumed that the only indebtedness of the partners to the partnership was the indebtedness of the partnership to Robinson-Magids & Company, when it necessarily appears that the appellee, Greenberg, was indebted to said partnership for moneys withdrawn and for his share of the expenses unpaid, and when it further appeared from the findings

that the partnership was indebted to defendants Stanley and Sallo in the sum of $2400.00 (Tr. 106) and to Frank Lesamis in the sum of $1158.53 (Tr. 121).

6. The amended findings and amended decree recede from the opinion and mandate of the Circuit Court of Appeals in this: That a distribution of proceeds of partnership property is directed to be made in payment of the individual debt of the appellee for purchase money due when the opinion clearly states that this is not to be done, and apportions the individual debt of plaintiff to his partners as an asset of the firm.

7. The amended findings and amended decree fail to order or direct execution or payment of the debts found due from the partners to the firm.

8. The amended findings and amended decree fail to adjudicate all the material issues raised by the pleadings and fail to adjudicate the amount due from one partner to the other.

9. The amended findings and amended decree embody apparent error in the opinion of the appellate court in failing to observe that with the new basis for an accounting by the appellee to his partners on account of purchase money due them, it became necessary also to charge said appellee with his share of expenses, which was not necessary to be done, and which was not done, under the theory or basis for such accounting made by the trial court, and which necessity the appellate court inadvertently overlooked.

10. The amended decree failed to adjudicate the amount due to Stanley and Sallo, to wit: $2400, mentioned in the findings (Tr. 106).

11. The amended decree failed to adjudicate with reference to the claim against M. F. Moran, $720.00 admitted by the reply to be due to the partnership (Tr. 32).

12. The amended decree contemplated a further accounting and to that extent was not final and it did not treat all the parties to said action as actors and did not adjudicate their respective rights.

13. The amended decree did not adjudicate in regard to an item of $1158.53 admitted by appellee to be due to one Frank Lesamis for money borrowed by the partnership and which amount was included in the so-called output of 1911.

14. The amended decree contained no order or mandatory part nor did it provide for execution or payment of moneys found due except with reference to the partnership property.

15. The amended decree was erroneous in this: That it ordered and decreed "That the plaintiff do have judgment as prayed for in his complaint herein" the same not being based upon or justified by the findings of the court and not consistent with the findings and conclusions of law, the said complaint tendering an account of all matters and things relating to said partnership and relating to the dealings of one partner with the firm and of one partner with the other concerning which the decree was silent, except in part.

16. The court erred in refusing to appoint a referee and in refusing to take an accounting and in overruling appellants' motion in that behalf.

17. The court erred in that it was inconsistent with the findings of fact and with the opinion and mandate of the appellate court to decree that the appellee had fulfilled and carried out the terms, covenants and conditions by him to be kept and performed under the partnership agreement and his agreement of purchase.

18. The amended decree was erroneous in this: that in the amount found due from appellee *to the partnership was not included* moneys ($5238.19) withdrawn by him from the net profits of 1910, which the trial court in its original findings and decree upon an erroneous construction of the contract (deed), allowed to be applied on purchase money due from him to appellants; and, also, in this: that in said amount found due from appellee to the partnership *was not included* sums equal to his one-quarter of the expenses found to have been incurred ($8959.75 for 1910, and $26,271.00 for 1911) and which it became necessary to include, after the theory of the trial court had been reversed; because by said reversal the appellee's one-quarter of the gross output ($16,351.42 in 1910 and $9786.88 in 1911) was to be applied in payment of purchase money due to appellants, and could no longer be credited to appellee on his expenses, as was done by the trial court. To the extent that the gross output was applied on expenses of the partnership

the same should have been *wholly* credited to appellants and plaintiff charged with a like sum. The erroneous credit of one-fourth of output given appellee by the trial court in its original findings and decree, was also carried into the amended findings and decree as well as the "adjustment" of the appellate court. The appellate court inadvertently built its "adjustment" not only on these errors of the trial court but also on the error in computation above mentioned.

19. The amended decree was erroneous and inconsistent in that it awarded costs against the defendants personally after providing for the payment of said costs from the proceeds of the sale of the partnership property (Tr. 113, 108).

20. The court erred in overruling the motion of the appellants to vacate the sale on execution, it appearing that the partnership property was bid in by the appellee but that no part of his bid was paid (Tr. 122).

Argument.

Some of the errors pointed out might have been made on a reargument, if seasonably discovered. Alaska is too far from San Francisco to make such discovery in time; but, ample authority for a remedy by second appeal, involving the questions above presented, is to be found:

If there arises a dispute over the proper interpretation or application of an opinion or mandate,

or if the court does not follow the law in the case, or misconstrues the mandate, or fails to give appropriate relief outside of the mandate, or fails to correct errors in computation, the remedy of the complaining parties is by second appeal.

3 Cyc., 490 and cases cited;

In re Marks, 136 Fed. 168;

Great Northern Ry. Co. v. Western Union T. Co., 174 Fed. 323;

In re Sanford Fork & Tool Co., 16 S. Ct. 291.

In the latter case it was held that

> "On a new appeal it is for this (the appellate) court to construe its own mandate and to act accordingly.
>
> "To say that a court may not correct its own mistakes is to push it to an absurd conclusion * * * By following the opinion the trial court never technically errs. When the case again comes before the appellate court the question is not, did the trial judge proceed according to the opinion, but were his rulings correct in law? To enforce erroneous rulings simply because the appellate court had directed the error, would be to pervert the law and sacrifice justice to the technicality of practice."

Hastings v. Foxworthy, 34 L. R. A. 321 (Neb.);

Adams Co. v. R. R. Co., 55 Iowa 94.

> "Errors in the entry, either of the findings or of the judgment, may be corrected by the court during the term at which the same was entered. Errors, however, that appear clearly on the face of the record, may be corrected after term time * * * This power is not dependent on statute and may be exercised in term time or

vacation by the same judge or his successor, and even after the death of the parties."

10 M. A. L., 162, 531.

"If the findings contain an erroneous statement of the entire sum due, it would not be controlling, and the judgment should be given upon a corrected computation. The want of a computation, when the basis for giving it is given, is of no significance."

Metcalf v. City of Watertown, 68 Fed. 859.

"The court is not, under all circumstances, bound to render a servile obedience to the mandate of the Supreme Court. It is bound to exercise a judicial discretion in the interpretation and execution of the mandate."

The Sabine, 50 Fed. 215.

"It is to be interpreted according to the subject matter to which it has been applied and not in a manner to do injustice * * * The obedience to the mandate should be an intelligent and not a blind obedience."

Story v. Livingston, 13 Pet. 373; 10 L. Ed. 200.

The mandate should not be strictly followed so as to work a manifest injustice where it appears to have been framed upon a misapprehension.

Baltimore etc. R. Co. v. Mackay, 157 U. S. 72; 15 S. Ct. 491.

"The better rule and that more in accord with justice is that though ordinarily a question considered and determined on the first appeal is deemed to be settled and not open to re-examination on a second appeal, it is not an inflexible rule, and if the prior decision is palpably

erroneous, it is competent for the court to correct it on the second appeal. This may be said to be the view which has for its support the trend of many authorities * * * There would seem to be no question but that an appellate court may, upon a second appeal, correct the entry of the former judgment, so as to make it express the true decision of the case."

2 R. C. L. 226; par. 188 and cases cited.

"The rule known as the law of the case, while conclusive, like a former adjudication as to all matters within its scope, cannot be invoked except on questions which have actually been considered and determined in the first appeal. The rule * * * is not to be extended beyond the exigencies which demand its application."

2 R. C. L., par. 192.

Clerical misprisions in the decree may be corrected where the record furnishes the means of correction.

Bramlet v. Picket, (Ky.) 12th Am. Dec. 350 and note.

So a mistake in the amount of a judgment.

Latta v. Griffith, 57 Ind. 329;
Long v. Gaines, 4 Bush 353.

Interest has been allowed after mandate and held not to be error although interest was not mentioned in the appellate court.

Gaines v. Rugg, 148 U. S. 228;
Kneeland v. Am. L. & T. Co., 138 U. S. 509; 11 S. Ct. 426.

The lower court is left free to make an order or direction in the further progress of the case not

inconsistent with the decision of the appellate court as to any question not presented or settled by such decision.

Cunningham v. Ashley, 16 Ark. 181; 63 Am. Dec. 62.

In the case of *Moore v. Huntington,* 17 Wall. 417, it was said:

> "The basis of the account being entirely erroneous * * * and considering the loose and unsatisfactory character of the whole report * * * it is utterly insufficient as a foundation for any decree. Nor can we undertake, with no other report, to render one with which we would be satisfied."

We regret that the appellate court did not follow this rule on the former appeal.

In the case last above cited it was also said:

> "A cross-bill was filed by defendants, which was answered. No notice of this was taken in the final decree, which should have been, though the court undoubtedly supposed it was disposing of the whole case. On the return of the case this may be corrected."

This forcibly applies to the cross-bill of Stanley and Sallo in the present case, although the court in its findings expressly stated that the sum of $2400.00 was due said Stanley and Sallo (Tr. 106). "No notice of this was taken in the final decree, which should have been done".

Authorities justifying the correction of the errors of the court in the case at bar could be multiplied indefinitely; but we consider that this court in the

case of *In re Marks,* 136 Fed., *ante,* is decisive of the rule to be followed in this case, and it is to be observed that:

> "The courts of today are assuming a more liberal attitude in the matter of correcting mistakes than obtained formerly."

The law of *fiat justitia* is superior to that of the law of the case.

> *Missouri etc. R. Co. v. Merrill* (Kan.), 59 L. R. A. 711
>
> "Where an erroneous decision has been rendered in the former appeal, the doctrine of *stare decisis* will not prevent the court from correcting the error, especially when it can be done before the litigation in which the error has been committed has terminated finally."
>
> *15 R. C. L.,* 960, par. 435.

Rule No. 32 of this court, as well as the mandate, contemplates that further proceedings may be had in the trial court "As to law and justice may appertain".

The appellate court on the former appeal in directing that finding No. 11 be changed to conform to the opinion of the Circuit Court of Appeals and that the decree be modified accordingly, necessarily directed the correction of other findings *inconsistent* with said finding No. 11 as amended.

We do not contend that by the appeal this case is again opened, on the evidence, but that it does require here, as it should have received in the trial court, an examination and correction of inconsistent

findings and a construction of the mandate different from that of the trial court.

Since reviewing the decisions of the courts in this case we are constrained to agree with Chief Justice Marshall when he said in the case of *Dubourg de St. Columb v. U. S.,* 7 Pet. 625:

> "We are of the opinion that a complex and intricate account is an unfit subject for examination in court and ought always to be referred to a commissioner to be examined by him and reported in order to a final decree."

And in relation to taking partnership accounts, the rule is correctly laid down in *Lindley on Partnership,* pars. 970, 973 and 975, and should have been followed.

An examination of the findings in this case will show that the method of accounting by the trial court was so unique and so simple as to *create suspicion.* The record showed many different items that would necessarily enter into the account, besides the debt due from the partnership to Robinson-Magids & Co. Yet the trial court found that this debt was *to a cent* equal to the difference between the total expenses of the partnership for the years 1910 and 1911, $35,231.45, and the total output for said year, $26,138.30, or $9093.15 plus the net profits of 1910, $7391.67, which equals $16,484.82, the debt due Robinson-Magids & Co. without interest. The court found an equally short method to establish the amount due from each partner to the partnership. This was done by dividing the Robinson-Magids & Co. account into four parts, charg-

ing each of the partners with one-quarter thereof, giving defendants credit for $2153.48 and *charging plaintiff with the balance.* This result followed an erroneous theory or basis for accounting and also errors in computation.

The appellate court, in adjusting the account upon a new basis accepted, and built upon, the erroneous computation of the trial court in the matter of subtracting the credits above mentioned, and failed to supply items necessarily to be taken into account on the new theory, as shown above.

Then, there were the defendants Stanley and Sallo who, by the findings of the trial court were entitled to a credit of $2400.00 (Tr. 106) for assessment work but who recovered nothing by the decree.

Again there was an item of $1158.53 due Frank Lesamis (Transcript 128 of former appeal) left out of the account.

These items were all within the material issues of the pleadings and should have been reckoned with in the decree.

The rights of the parties to the action as between themselves were not adjudicated and no mandatory order was made with reference to same. A sale and distribution of the partnership assets, omitting, however, the Moran indebtedness of $720.00 admitted by plaintiff to be due to the partnership (Tr. 32) was the only mandatory part of the decree, and, when it is considered that the partnership debt was one *in solido,* the division of the debts of the firm between the partners became immaterial, in that

the proceeds of the partnership assets would only reduce the partnership debt *in solido*. Besides, the trial court as well as the United States Marshal treated the *plaintiff* as a *judgment creditor* and permitted him at the execution sale to bid in the partnership property in his own name, "without money and without price". The amount bid was never paid or offered to be paid but the sale on execution was permitted to stand and no reduction of the partnership debt seems ever to have been made. Nor is there any remedy whereby the amounts found due from the partners to the firm or from one partner to the other beyond partnership property can be enforced without an amendment of the decree. Separate actions must be brought by creditors and by the individual partners, one against the other, as their interests may appear, and when this is attempted plaintiffs will undoubtedly be met with the defense of *res judicata*.

In 1 R. C. L., page 225, par. 27, it is said:

> "A bill in such a suit imparts an offer on the part of the claimant to pay any balance that may be found against him * * * It is not necessary for defendant to file a cross-bill. Both parties are actors. Defendants are entitled to an *affirmative decree* in their favor if the accounting should justify it."

The defendants Stanley and Sallo, however, did file a *cross-bill,* and a finding was made in their favor, but *not* the decree—it remained silent as to them.

We contend that the decree on its face shows that a further accounting was contemplated and the same should have been had after mandate.

There is another feature of this case. The plaintiff was admittedly a partner in the creditor as well as in the debtor firm. The former could not sue the latter at law, but, in proceedings to account might recover the debt of the insolvent firm and the interest of the common partner in the solvent firm (the plaintiff's credit in one firm offset by his debit in the other).

Story's Equity, par. 680;
Hays v. Bennett, 3rd Sanford 394.

For the purpose of avoiding such contingency, and for the purpose of enabling the creditor firm to collect at law, the account of the former was assigned to Phillip Murphy, plaintiff's agent, without consideration. Murphy could undoubtedly sue if the assignment was "actual and real".

Buchanan v. Liebe (Or.), 5 Pac. 273.

But Murphy testified (Tr. 229, former appeal): "I have no personal interest in this law suit." And the plaintiff testified (Tr. 196, former appeal): "I am liable to my partner personally for the indebtedness of the Klery Creek Mining Co. It was all charged up to me personally." Yet, the whole burden of the decree was to prefer the said Robinson-Magids & Co. as a creditor of the partnership. Their claim was made the basis of all accounting and the end of all liability.

In the matter of the failure of the trial court to set aside the sale on execution for want of the payment of the bid, we think such proceedings were contemplated by the opinion of this court, when it said:

> "As sales of assets are made, of course the partners will share equally in the proceeds, and be entitled to have the same applied in that proportion to their indebtedness to the firm, and the adjustment in the end will be on the basis of an equal division of the partnership property."

This could not be done when bids are not paid. Besides, the plaintiff, who no longer accounts to his partners for what his share of the partnership property brings (and which he did not pay for) gets more than an "equal division".

The further accounting as to proceeds of sales, at least, should have been allowed.

This is a suit in equity. "He who seeks equity must do equity." Let us see how this was accomplished by the decree:

Plaintiff, a common partner in both the creditor and the debtor firm, recovers, as partner in one firm, his share of $19,314.94, though his liability to the other, the debtor firm, was *more than one-half of this amount,* and without the necessity of paying anything out. He does this, without having paid his share of the capital stock (the mining claims) of the debtor partnership; without advancing his share of the costs of the mining operations; without refunding to the partnership the amount

of the net profits withdrawn by him; and without paying his bid on the execution sale of the partnership property, he acquires title to the latter, so that, in the end, the plaintiff, instead of paying $30,000 for only a quarter interest therein, as he agreed to do, gets all the property for a bagatelle, and lets the defendants, the original owners, *who have paid all the expenses of the mining operations, so far as paid,* "hold the sack", without any recourse against the plaintiff for contribution, or for moneys due them on individual account. His firm, Robinson-Magids & Company, not parties to the suit, were in effect made judgment creditors; while Stanley and Sallo, parties to the action, must content themselves with a mere finding, not a decree, as to the amount due them. And the creditor, Frank Lesamis (by plaintiff's own admission, Tr. 128, former appeal) is entirely left out in the cold.

After appeal, the case came back without mandatory orders, and is again before this court "so that such further proceedings may be had as to law and justice may appertain".

Respectfully submitted,

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